

EXHIBIT 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ORACLE AMERICA, INC.,)
Plaintiffs,)
vs.) Case No.
GOOGLE INC.,) 3:10-cv-03561 WHA
Defendant.)
-----)

VIDEOTAPED DEPOSITION OF SIMON PHIPPS
San Francisco, California
Saturday, May 7, 2016
Volume I

Reported by:

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CSR No. 8239

Job No. 2304880

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PAGES 62-63 ARE ATTORNEYS' EYES ONLY AND BOUND
UNDER SEPARATE COVER

Page 1

1 Q Do you agree that that appears to be a
2 reference to a general industry custom?

3 MR. KWUN: Objection. Form.

4 THE WITNESS: I would say that that
5 appears to be a reference to a general practice by
6 software developers.

7 BY MR. OTTENWELLER:

8 Q What industry?

9 A In the software industry.

10 Q And is that a practice that you believe
11 refers to a practice involving the declarations and
12 SSOs of APIs?

13 MR. KWUN: Objection. Form.

14 THE WITNESS: I believe that it's -- that
15 -- as a programmer, which I have been a programmer
16 in the past, I would not give a second thought about
17 the existence of a license for function declarations
18 that I'm putting at the top of a program.

19 BY MR. OTTENWELLER:

20 Q Well, I'm not sure that was responding to
21 the question I asked you. I'm trying to learn the
22 boundaries of what your expected testimony are.

23 The reference to declarations and SSO --
24 do you understand that in this disclosure that is a
25 reference to declarations and SSOs of APIs?

1 expression meant during the time period 2005 through
2 2007; do I have that right?

3 A I was not familiar with that as an
4 expression for the concept it describes.

5 Q Okay. So let's -- let's go to the time
6 period 2005 through 2007.

7 A Okay.

8 Q You do feel comfortable in giving
9 testimony as to what you think the practice was with
10 respect to using declarations of APIs without a
11 license during that period of time?

12 A I'm happy with that.

13 Q State in your own words what you think the
14 practice was at that point in time.

15 A A programmer would expect to be able to
16 declare any functions that they would later have
17 included by linking or by a dynamic reference in
18 their program, and they would use those function
19 declarations without regard to license because they
20 would not expect to need a license to use the
21 declaration, although they might expect to need it
22 -- or they should expect to need a license to the
23 implementation later on when the program is linked.

24 Q You testified with reference to
25 programmers that, quote, "they should expect to need

1 a license to the implementation later on when the
2 program is linked," correct?

3 A Yes.

4 Q And that, in your view, was a general
5 expectation with respect to the declarations of
6 APIs, correct?

7 A Yes.

8 MR. KWUN: Objection. Form.

9 BY MR. OTTENWELLER:

10 Q So if one views the practice within the
11 software industry during this time period, 2005
12 through 2007, there was an expectation, as far as
13 you know, that a license at some point would be
14 required, correct?

15 A A copyright license, yes.

16 Q Yes. Thank you.

17 In describing what you view as the
18 practice in the software industry back in this time
19 period, 2005 through 2007, what are you basing your
20 testimony on?

21 A I'm basing my testimony on my own
22 experience programming, and I'm also basing it on
23 the observed practice of the software developers
24 that I met at conferences, who I encountered within
25 Sun Microsystems, who I worked with within

1 customers, and who I encountered through contact on
2 the Internet and mailing lists and other social
3 media of the time.

4 Q You're basing it first on your own
5 personal expectations, correct?

6 A Yes.

7 Q Now, you would agree with me, would you
8 not, that your own personal expectations don't make
9 an industry-wide custom, right?

10 MR. KWUN: Objection. Form.

11 THE WITNESS: They would reflect -- they
12 would be more likely to reflect an industry-wide
13 custom, yes.

14 BY MR. OTTENWELLER:

15 Q They don't make the custom, though, do
16 they?

17 MR. KWUN: Objection. Form.

18 THE WITNESS: Well, obviously not. The --
19 the --

20 BY MR. OTTENWELLER:

21 Q Because you're one -- you're just one
22 individual.

23 A Absolutely.

24 Q Right?

25 All right. So you would agree, when you

1 say your own personal experiences, that can't be
2 evidence of a industry-wide custom, correct?

3 MR. KWUN: Objection. Form.

4 THE WITNESS: I would suggest to you that,
5 unless I was a very unusual programmer, I would find
6 it very difficult to work in a way that was not the
7 norm amongst my professional practice.

8 BY MR. OTTENWELLER:

9 Q Did you ever do a survey to see if that
10 was true?

11 A No. Why would one do a survey of a thing
12 that was observable in every programming -- in every
13 project that one encountered?

14 Q So what did you observe? And by that I
15 mean, what specifically did you observe that leads
16 to the basis for this view?

17 A Well, we'll have to go back. I have a
18 degree in electronic engineering, and I worked on
19 writing computer software as part of that degree. I
20 was trained to do so. And I wrote a compiler as
21 part of my degree course. I wrote it in the Pascal
22 programming language, and that involved making
23 declarations. And at no point was I advised to
24 check that I had a license to the declarations that
25 I was using.

1 And then at every point in my career when
2 I was performing programming tasks in other
3 languages from that point onwards, no employer
4 suggested to me that I needed to be cautious of the
5 declarations. They always were wanting to make sure
6 I was cautious that I had the -- that I had paid for
7 the -- the software when it was deployed, but that
8 was never a part of the programming experience. And
9 that continued to be my experience when I was
10 working for IBM, and that continued to be my -- I
11 didn't do any programming at Sun, but it continued
12 to be my observation of the programmers around me.

13 And the advantage I had at Sun was of
14 working in the open source community, where I had
15 visibility into a number of other projects to see
16 what their practices were. And at no point do I
17 recall seeing an example which would suggest that my
18 personal practice was in some way unusual.

19 BY MR. OTTENWELLER:

20 Q Let me -- let me make sure that I -- that
21 I understand the full scope of what you're saying.

22 So you're referring to your experience as
23 a software programmer, right?

24 A Yes.

25 Q And to rephrase what you said, you said,

1 A That's absolutely true, but it was outside
2 the scope of my job responsibilities.

3 Q You weren't responsible for the commercial
4 licenses, right?

5 A That's correct.

6 Q But you do know that there was a practice
7 at Sun during the time you were there to make the
8 declaring code and APIs available through a
9 commercial license, correct?

10 MR. KWUN: Objection. Form.

11 THE WITNESS: I'm aware that the Java
12 platform was being made available to licensees.

13 BY MR. OTTENWELLER:

14 Q And that included the declaring code and
15 SSO of the APIs, did it not?

16 A It did, but you asked specifically about
17 the APIs necessarily, and I would expect those to be
18 licensed together with the implementations.

19 Q Okay. Good.

20 And that was a prevalent practice at Sun
21 during that time period, was it not?

22 A Could you explain what you mean by
23 "prevalent"?

24 Q There were multiple commercial licenses
25 under which Sun allowed others to use the Java APIs,

1 me an indication that somebody is claiming there is
2 a copyright.

3 BY MR. OTTENWELLER:

4 Q All right.

5 A But the copyright could be -- could --
6 there are other -- there are a number of ways that I
7 would expect, as a layman, copyright to occur,
8 including as the compilation of facts rather than
9 the specific facts that are in the document.

10 Q Notice in that very last line on the very
11 last page of Exhibit 5175 there's a statement that
12 reads, quote, "Use is subject to license terms,"
13 closed quote.

14 While you were employed by Sun, did you
15 understand that the use of the APIs was subject to
16 license terms?

17 MR. KWUN: Objection. Form.

18 THE WITNESS: I don't believe that's a
19 well formed question.

20 BY MR. OTTENWELLER:

21 Q Well, can you answer it even though you
22 may have some quarrel with how it's formed?

23 A Well --

24 Q Do you want to hear it back?

25 A Well, the difficulty I have with the

1 question is that you insist on continuing to talk
2 about the use of APIs. An API is useless without an
3 implementation. The license generally applies to
4 the implementation. So the use of this with regard
5 to license terms is going to refer to the overall
6 use of it with regard to creating an implementation.
7 I would not expect there to be a restriction on
8 including any of these function calls in my program.

9 Q Well, that's not what I was really asking
10 you. So --

11 A Right. And this is why I say I believe
12 your question was incorrectly formed.

13 Q So let me -- let me ask you a related
14 question and see if we can't get to the point.

15 This is a document that refers to Java
16 APIs, correct?

17 A This is a document that describes the Java
18 -- part of the Java platform.

19 Q APIs. It says so right here, sir. "API
20 specification."

21 A Well, it's the specification of the APIs
22 for the Java platform.

23 Q Fine. Thank you.

24 And it also says that use of whatever is
25 referred to in this document is subject to license

1 A Well, the APIs didn't need a license, but
2 the platform, as a whole, was subject to license
3 terms, and the API is a part of the platform when
4 the whole thing is licensed together.

5 Q Well, now, Mr. Phipps, we just looked at a
6 document that -- you can look at it again. We
7 looked at Exhibit 5175, which is a listing of the
8 APIs -- the Java APIs. Do you have that in front of
9 you?

10 A It's that one. Yes.

11 Q I asked you point blank, in referring to
12 the very end of this document, wasn't the use of the
13 APIs referred to in this document subject to license
14 terms, and you answered "Yes," did you not?

15 MR. KWUN: Objection. Form.

16 THE WITNESS: So I believe that I've been
17 consistent in making sure that we always refer to
18 the use of the Java platform rather than just the
19 APIs. And the use of the Java APIs within the
20 context of the platform does require a license, and
21 so the generic statement that appears at the end of
22 all of these documents refers to the Java platform.
23 It says here: "Java 2 Platform Standard Edition
24 5.0."

25 So everything -- everything related to the

1 license, and the OpenJDK, and the GNU
2 general-purpose license.

3 You referred to a fourth way. Can you
4 remind me again of what that fourth way was?

5 A We made the -- the Java platform available
6 for Linux to the Debian community in the interim
7 period while we -- between when we said that we
8 would release Java as open source and when we
9 actually released OpenJDK, which I think was 2007.
10 We worked in the Debian community to make the binary
11 -- the downloadable binary package available to them
12 on -- on terms they were willing to accept.

13 Q All right. What I'm not picking up in
14 your answer is what community you're referring to.

15 A It's the Debian community.

16 Q Spell that for me.

17 A D-e-b-i-a-n.

18 Q And what is that?

19 A The Debian community is a community of
20 software developers who produce the -- probably the
21 most important GNU/Linux distribution, the Debian
22 distribution, upon which many other distributions
23 are based. So, for example, the Ubuntu GNU/Linux
24 distribution is based on that, and many government
25 Linux distributions are based on that.

1 Q Was that for research purposes?

2 A No. That was a very -- a very key part of
3 our business strategy.

4 Q Is that related to OpenJDK?

5 A So it related to making sure it was
6 possible to use Java on open source platforms, which
7 was one of our business priorities.

8 Q Okay. Going back to the time period that
9 I have been focusing you on -- 2005 through 2007 --
10 did you personally ever have any communications with
11 Google about Google using the APIs through OpenJDK?

12 A No, I don't recall any communication.

13 Q Just to follow up on that, did anyone on
14 behalf of Google tell you during that time period
15 that it was considering using the APIs through the
16 OpenJDK option?

17 A I did not have any communication with
18 Google during that period.

19 Q What was your relationship with Google
20 during the time that you were the chief open source
21 officer?

22 A So -- so over the entire period, from 2005
23 to 2010?

24 Q Yeah. In general, what was your
25 relationship?

1 work out what it was that actually made me decide
2 that I would accept the invitation to come over
3 here.

4 Q You weren't sure?

5 A I'd have to look back and work out where
6 the decision point was, but certainly a contributing
7 factor to agreeing to spend two weeks here, because
8 I can't drop in from my office, is that I would very
9 much like to see the case settled to clarify the
10 status of APIs, and I would be pleased to share my
11 experience to make that happen.

12 Q So if I understand what you're saying, you
13 don't think -- let me put it this way: You think,
14 as a matter of personal philosophy, that APIs should
15 be available for use without any licensing
16 restrictions, true?

17 A I would say that that was an
18 oversimplification.

19 Q But generally correct?

20 A But general -- as a general statement, I
21 believe that programmers should not have to worry
22 about license terms when they use APIs.

23 Q Okay. But, of course, they do worry about
24 them now because that's the state of affairs in the
25 industry, right?

1 MR. KWUN: Objection. Form.

2 THE WITNESS: I believe that in the
3 industry at the moment there is a growing concern,
4 yes.

5 BY MR. OTTENWELLER:

6 Q That's because in the industry use of APIs
7 is subject to license terms, right?

8 A No.

9 MR. KWUN: Objection. Form.

10 THE WITNESS: That's because the practice
11 of the industry is that APIs are not subject to
12 license terms, and this decision appears to reverse
13 that industry practice and expectation.

14 BY MR. OTTENWELLER:

15 Q All right. So when you tell me, sir, that
16 the practice in the industry is to use APIs without
17 being subject to license terms, tell me specifically
18 in terms of hardcore facts what you're relying upon.

19 A Okay. So if you -- if you were to go and
20 get hold of a piece of software that's being
21 developed in an open source community -- let's take,
22 for example, Apache HTTPD, which is the most widely
23 used web server on the Internet. When declarations
24 are made at the top of the file to indicate which
25 functions are going to be used by the program, there

1 are not, next to those declarations, any comments or
2 repetition of copyrightable -- copyright ownership
3 or license terms associated with the function
4 declarations, which indicates that the programmers
5 are not concerned about the ownership of those
6 specific parts of the program; whereas, they're very
7 scrupulous to ensure that copyright terms and
8 licenses for the parts of the program that are
9 within the file are rehearsed.

10 I would have expected that if there was a
11 concern about the licenses for the function
12 declarations, that the programmers involved would
13 have some concern to document the way in which they
14 are complying with the license terms.

15 Q Cite me the specific instances that you're
16 referring to. Who? What? When? Tell me the
17 details.

18 MR. KWUN: Objection. Form.

19 THE WITNESS: Okay. I think that's a very
20 difficult question to answer just at the snap of
21 fingers. But I'd invite you to look at any of the
22 source files for Apache HTTPD and check whether any
23 of those files in the function declarations that
24 they make have any reference around the function
25 declaration to the copyright ownership or licensing

1 MR. KWUN: Object- -- you have to let me
2 finish my objection.

3 THE WITNESS: Okay. Finish your
4 objection.

5 MR. KWUN: Objection. Form.

6 THE WITNESS: No, that doesn't refresh my
7 recollection.

8 BY MR. OTTENWELLER:

9 Q Looking back at the first page, do you
10 have any reason to question whether this was a
11 Sun-authored document?

12 MR. KWUN: Objection. Form.

13 THE WITNESS: It's pretty hard to tell who
14 authored it, but it was -- there's -- there's a URL
15 at the bottom that says it was taken from Java.net.
16 So it's likely it was Sun authored.

17 MR. OTTENWELLER: I'm sorry. What was his
18 last phrase?

19 (Record read by the Reporter as follows:

20 "ANSWER: It's pretty hard to tell who
21 authored it because there's a URL at the
22 bottom that says it was taken from
23 Java.net. So it's likely it was Sun
24 authored."[sic])

25 THE WITNESS: I didn't say "because," I

1 don't think. I just -- I just said "It's pretty
2 hard to work out who authored it, but there is --" I
3 think maybe that's what you heard.

4 BY MR. OTTENWELLER:

5 Q Tell me, if you would, what GNU Classpath
6 is or was.

7 A So GNU Classpath was a project to create
8 an independent implementation of the Java class
9 libraries under the GNU GPL.

10 Q The GNU Classpath project was not
11 authorized by Sun, was it?

12 A It was not. I don't recall anyone asking
13 for authorization. So it was not denied either.

14 Q But as far -- we'll get to that.

15 But as far as you know, you never saw any
16 document that indicated that Sun authorized the GNU
17 Classpath project, right?

18 A I'm not aware of any such document.

19 Q Let me show you what has been marked as
20 trial Exhibit 5246. 5246 is an email from one
21 Matthew Marquis at Sun to a Mr. Kim.

22 Do you see that at the top?

23 A Yep.

24 Q Now, you know who Matthew Marquis is,
25 correct?

1 Q This refers to assisting with Sun's own
2 implementation of the APIs in OpenJDK.

3 A It doesn't imply that Sun's -- that
4 they're assisting -- it's -- I understand what it
5 means.

6 Q Well, tell me.

7 A It says -- so what the IcedTea project was
8 doing was -- so we have to roll back. OpenJDK, when
9 it was first released, had a number of functions
10 that were not implemented for IP reasons that I'm
11 not completely sure about, things like the media
12 APIs, and those were stubbed out so that programs
13 would compile without errors, but when programs
14 called the function, it would actually do nothing.

15 And the IcedTea project implemented mostly
16 Linux implementations of those functions so that the
17 functionality available on Linux would be the
18 equivalent of the functionality that was available
19 on the platforms that Sun was directly creating,
20 such as Windows.

21 Q How --

22 A And so they assisted the project in the
23 sense that -- oh, they assisted with Sun's
24 implementation of the APIs in the sense that they
25 were writing implementations for the -- to replace

1 those stubs on Linux. So it was a full
2 implementation. They were not, however, employees
3 of Sun.

4 Q How did Mr. Schwartz, the CEO of Sun,
5 authorize you to reach out to the open source
6 community?

7 A He had encouraged me from the beginning of
8 his tenure as CEO to go and work on improving Sun's
9 reputation with the open source community and to
10 create a consulting group inside Sun to help our
11 product teams improve that set of relationships.

12 Q Did he tell you in a verbal communication?

13 A He certainly told me in a verbal
14 communication.

15 Q Did he ever put it in writing?

16 A I really don't recall, and you have much
17 better access to my email than I do, as I last saw
18 this email when it was automatically deleted one
19 year after it was created. So who knows? Maybe
20 there was an email many years ago.

21 MR. OTTENWELLER: All right. We are at
22 the end of the two-hour mark. I am going to say
23 that Oracle is reserving its right to take more
24 deposition time with Mr. Phipps. Given Google's
25 position that he is a key witness in the case, two

1 I, the undersigned, a Certified Shorthand
2 Reporter of the State of California, do hereby
3 certify:

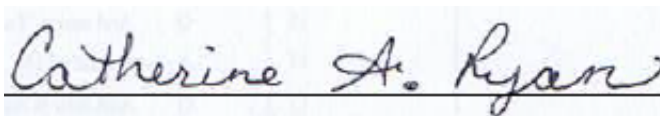
4 That the foregoing proceedings were taken
5 before me at the time and place herein set forth;
6 that any witnesses in the foregoing proceedings,
7 prior to testifying, were administered an oath; that
8 a record of the proceedings was made by me using
9 machine shorthand which was thereafter transcribed
10 under my direction; that the foregoing is a true
record of the testimony given.

11 Further, that if the foregoing pertains to the
12 original transcript of a deposition in a Federal
13 Case, before completion of the proceedings, review
14 of the transcript [] was [] was not requested.

15 I further certify that I am neither
16 financially interested in the action nor a relative
17 or employee of any attorney or any party to this
18 action.

19 IN WITNESS WHEREOF, I have this date
20 subscribed my name.

21 Dated: 5/7/16

22
23 

24 Catherine A. Ryan, RMR, CRR

25 CSR No. 8239